

Judges on Judging

State of the Ohio Judiciary

THOMAS J. MOYER*

I. INTRODUCTION

Mr. Speaker, Mr. President, my esteemed colleagues on the Supreme Court, distinguished members of the 118th General Assembly, elected state officeholders, cabinet officers, representatives of the judicial system, my family, and fellow Ohioans.

President Aronoff, Speaker Riffe: I thank you for this historic opportunity to address a joint convention of the two Houses of the General Assembly to report on the state of Ohio's judiciary.

President Aronoff asked me last September whether it would be appropriate for a Chief Justice to address the General Assembly on the state of the judiciary. I assured him that such an appearance does not violate the principle of separation of powers. Indeed, my counterparts in thirty-three states make such a report to their state legislatures, a few because their constitutions require it and most by invitation.

I am here not in response to a constitutional duty but in the spirit of cooperation and mutual respect that characterizes the relationship between two independent branches of government. To fully appreciate that relationship in the present and in the future, let us review a few important events in our past.

This month, we observe the 200th anniversary of the first session of the United States Supreme Court and legislation creating the territorial jurisdiction of what would become the Supreme Court of Ohio. Both occurred in 1790, and both institutions were established on the premise first articulated by Montesquieu and succinctly stated by James Madison: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."

Alexander Hamilton's esteem for an independent judiciary was reflected in his observation that "[l]aws are a dead letter without courts to expound and define their true meaning and operation."

But Hamilton's esteem notwithstanding, both the highest court of our land and the highest court of this state had very humble beginnings. The first session of the United States Supreme Court, delayed to February 2, 1790, because muddy roads prevented a quorum of justices from assembling, was held in a small room on the second floor of a commercial building across from the Fulton Fish Market in New York City.

* Chief Justice of the Supreme Court of Ohio. The following essay is a transcript of Chief Justice Moyer's February 14, 1990, address to the Joint Convention of the 118th Ohio General Assembly.

The Court moved from there to the mayor's courtroom in Philadelphia and later to a room twenty-four by thirty feet in the basement of the United States Capitol in Washington. Similarly, the fledgling high court of our state was fortunate to have a cramped space in a long corridor filled with stacks of legal books and case files at the end of which was the clerk's office; the offices were described at the time as having the appearance of a "henhouse." That space was generously provided by the legislature. Both courts waited many years after their creation for the legislative branch to build a house that was truly separate and adequate.

It would seem that James Madison foresaw such practical examples of interdependence when he agreed with the New Hampshire Constitution in *Federalist Paper Number 47*

[t]hat the legislative, executive, and judiciary powers ought to be kept as separate from, and independent of, each other as the nature of a free government will admit; or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of unity and amity.

The realization that the doctrine of separation of powers was not meant to be an impenetrable wall between or among the branches of government was stated more succinctly by Justice Robert Jackson when he observed: "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."

Separateness but interdependence; autonomy but reciprocity. When a court interprets and applies legislation, when it reviews the actions of administrators in the executive branch, it acts independently. When the Supreme Court adopts rules of superintendence for our courts, and rules for admission to the practice of law and the discipline of lawyers and judges, its acts are separate and independent from the other two branches of government. When the Court declares a statute to be unconstitutional, it is exercising its greatest independent constitutional power.

We on the Court today are grateful that the Court's authority to judicially review legislation for its constitutionality was established by Supreme Court Judge Todd: he escaped being impeached by one vote in 1809 for asserting such a thought in an opinion.

But when the Supreme Court submits its budget to the General Assembly, when we transmit for your approval changes in the Rules of Criminal Procedure, when we request your assistance in adopting child support guidelines, when you respond to a request for legislation such as that sponsored by Senator Montgomery and Representative Suster to revise our filing fees, those actions are reciprocal. In short, the courts, with all of their power, simply cannot function without some degree of reciprocity with the legislature.

It is in that spirit that I report to you on the state of Ohio's judiciary in 1990. It is in that spirit that I will discuss a critically important issue that requires the coordinated exercise of the power of all three branches of our state government. I am here not simply to present a report. I am here first to offer

the gratitude of all of us who work in the judicial branch of our state government for the respect you have shown us with your tangible support.

Although I agree with those who believe that more of the costs of operating our courts should be borne by state revenues, there is no question that under our current system of funding courts in this state, the General Assembly has given us the resources we need. You have provided levels of compensation that attract an increasing number of highly qualified people to the judiciary. We especially appreciate the assistance of Senators Gray and Ney, Representative Deering, and former Representative Bill Hinig in the adoption of our budget.

Another example is our Supreme Court Law Library which, at the inspiration of the late Chief Justice C. William O'Neill, has become the largest state supreme court library in the country, serving more than 52,000 patrons a year, many of whom are not lawyers. This year, the Library will become the first fully automated supreme court library in the nation.

These accomplishments would not, of course, have been possible without your support in the adoption of our budgets, another important example of our interdependence.

II. STATE OF THE OHIO JUDICIARY

A. *Judicial Caseload Statistics*

Today, the courts of Ohio are busier and more productive than at any time in history. Indeed, the complex issues facing state court judges today seem far removed from the early dusty days of hardy judges riding circuit for endless months.

To fully appreciate the importance of state courts to our citizens, consider these facts: ninety-five percent of all the cases filed in the United States each year are filed in state courts; the number of cases filed in Ohio's state courts, a total of three million cases, is more than the total number of cases filed in all federal courts in one year; there are more cases filed per judge in Ohio than in Michigan, Pennsylvania, Kentucky, New York, California, or Texas.

In the past thirty years, the motions filed in the Supreme Court have increased five-fold, and in 1988, the Court disposed of a record 3,528 matters. Caseloads in the district courts of appeals have increased by six times during the same period. Common pleas courts have seen a thirteen percent increase in filings over the past five years, while municipal courts have contended with a twenty percent increase.

You deserve much of the credit for legislative initiatives that resulted in an eleven percent decrease in OMVI filings since 1984, an excellent example of how action in the legislative and executive branches of government affects the judicial branch.

There were a record number of victims-of-crime compensation claims filed and disposed of in 1989. The Court of Claims has disposed of a record number of civil actions, at the rate of nearly two dispositions for every new filing.

The most ominous statistic we have is the thirty-five percent increase in juvenile case filings since 1984, and the steady trend that has produced that statistic. I will have more to say about that matter in a few moments.

The final statistic is perhaps the one of which the judicial system should be most proud. In the face of increased caseloads, our statewide statistics indicate that most judges are disposing of six to seven percent more cases per year than are filed. That is an impressive statewide statistic, but I recognize that some of you represent districts in which you believe there is occasionally a problem with a judge that perhaps requires attention from my office. I would hope that you will, as some have, inform us of those situations.

The statistics to which I have referred are impressive. But they do not reflect the severe pressures under which Ohio's judges perform their work; the agonizing process of imposing a sentence, counseling a juvenile, or choosing between two compelling legal arguments. But they do indicate that, when measured by the traditional standards used to determine judicial performance, the judges of Ohio continue to carry their burden with remarkable commitment.

B. Criteria for the Creation and Elimination of Judicial Positions

I also recognize that as caseloads have increased over the past several years, the General Assembly has responded with additional resources, including new judicial positions. This is perhaps the point at which I should describe what I see as our role in responding to the requests you receive to create new judgeships.

A majority of states have adopted formal, reciprocal arrangements between the supreme court and the legislature that provide a substantial role for the court in either initiating or responding to requests for new judgeships.

Ohio does not have such a formalized system. At the request of the House Select Committee on Court Reorganization, chaired by Representative Verich, with whom we have had a good working relationship, my office has developed proposed objective criteria for the creation or elimination of judicial positions against which a request can be tested.

The criteria have been developed to better assist the sponsors, the chairmen of the judiciary committees, and the members of the General Assembly when you consider judgeship legislation.

Our activity is reciprocal: While we may make a recommendation regarding a proposal, we recognize that the final decision, the deciding act, is legislative, not judicial. I appreciate the manner in which Senator Pfeifer and Representative Verich have worked with us in the development and application of the criteria.

C. Court Initiatives

Before discussing the major challenge facing us, I would like to report to you on actions we have taken to improve the administration of justice and to enhance respect for the courts and the legal profession. These accomplishments have been possible only because all members of the Supreme Court are committed to the improvement of our court system. During the last three years, we have:

- 1) Adopted minimum continuing legal education requirements for all lawyers, including an ethics and substance abuse component;

- 2) Adopted rules that clarify and improve the requirements for admission to the bar;
- 3) Strengthened the discipline system for lawyers and judges;
- 4) Adopted a Code of Conduct for all Supreme Court employees that has been recognized as one of the most comprehensive in the nation; and
- 5) Initiated education and training programs for all personnel in the court system.

In September of this year, we will hold the first statewide bench-bar conference at which lawyers and judges will discuss issues of common interest and make recommendations relating to improvements in case management. Solicitor General Kenneth Starr will deliver the keynote address.

In conjunction with the National Center for State Courts, we have established a nationally recognized technical assistance program. The program fosters innovation and stimulates improvements in the administration of trial and appellate courts.

In 1987, Ohio became the first state to adopt standards for the appointment of counsel representing indigent clients in capital cases.

Since 1987, the Court has held oral arguments in eleven counties in which high school students, who have discussed the cases in their classrooms, have attended a Court session. The experience, which began as an observation of the Bicentennial of the United States Constitution, has become a part of the Court's regular calendar in response to the positive reaction we have received from students and teachers.

This year, all courts in Ohio are operating under new rules developed by a committee chaired by Justice Resnick, when she was Judge Resnick, that will enable the Chief Justice to more effectively exercise his constitutional duty of superintendence over Ohio courts, expand the authority of administrative judges to resolve case management problems, discourage the repeated granting of continuances, and ensure the prompt disposition of cases.

D. Court Technology

Based on the recommendation of the Supreme Court Committee on Court Technology, we have established an Office of Court Technology to assist all courts in applying modern technology to court administration. It will provide staff support for planning, identify innovations applicable to courts, develop training and consulting services, and design computer software. The Office is cooperating with the Department of Youth Services to improve the flow and availability of information between juvenile courts and the Department.

I am pleased to announce that, in November, the Supreme Court will host the nation's first statewide court technology conference. The conference, which will include seminars and exhibits, will educate judges and court personnel on current technology to assist in the timely, efficient delivery of judicial services.

Initially, we have been able to support these programs from the judiciary budget. However, I would expect that as all of our courts enter the age of modern technology, we may need to request increased state funding.

E. *Dispute Resolution*

There is no system of justice in the world that is more accessible than the American judicial system. Our purpose is to fairly and impartially resolve people's disputes in a peaceful forum. The institution is viable because it enjoys the confidence of the people it serves. But if we ask ourselves whether the system functions as effectively as it can, the answer is no. Too many people are frustrated with the delay and the cost associated with resolving civil disputes. Too many cases are filed that should not be filed; too many cases languish on court dockets only to be settled after considerable delay and expense.

A neighborhood dispute may be better resolved in a mediation program, and issues regarding child custody and visitation in a contested divorce may be more satisfactorily resolved by a mediator than by court order. This fact is recognized in Amended Substitute Senate Bill 3, which passed the Senate yesterday under the sponsorship of Senator Drake.

The time to consider alternative means of dispute resolution is here.

Although we started far behind, Ohio is becoming a leader in the development of dispute resolution programs. There are two reasons. The first is a commitment by Governor Celeste, leaders of the General Assembly, and the Chief Justice to pursue dispute resolution alternatives. The creation and funding by the General Assembly of the Commission on Dispute Resolution and Conflict Management, proposed by Governor Celeste with my support, is a first in the nation.

The second reason is the Supreme Court Committee on Dispute Resolution. Formed last year, the Committee will inventory all dispute resolution programs in the country that can be applied in Ohio, propose pilot and model projects for courts in Ohio, and develop a statewide plan for dispute resolution. Across the country, successful programs abound. One of the most successful is "Settlement Week," in which more than thirty-seven percent of targeted cases have been settled by volunteer mediator-lawyers before the cases have aged on court dockets and become more costly to the parties.

We have a unique opportunity to say to persons who look to the Ohio legal system for the resolution of their disputes that we have various processes to resolve those disputes fairly and efficiently. I look forward to working with you as we fine-tune our initial efforts.

I have taken time to review some of the Court's actions in the hope that you will agree that we are working to use our resources prudently. We should not ask for the help of others until we have carefully scrutinized our own actions.

F. *The Impact of Substance Abuse on the Courts*

As we begin the last decade of the century and look into the new century, this should be a time to think and dream and plan for the future. But we are faced with a crisis that will consume much of our energy for the better part of this decade.

In the latter part of the eighteenth century, state court judges alone met the people's demands for a fair system of justice. In the latter part of the twen-

tieth century, state court judges continue to meet most of those demands. But judges today work on a frontier whose horizon is clouded with the phenomenon of substance abuse. The courts have had nothing to do with creating the problem, but play a pivotal role in imposing the solution. Just as we prepare to meet a storm created by nature, we must prepare to weather a wave of human tragedy produced by substance abuse if we are to keep from being awash with the legal residue. What is the nature of the problem in Ohio?

Statistics tell a part of the story. Between 1984 and 1988, criminal case filings in Ohio increased eighteen percent. We project that statistics for 1989 will show that criminal filings are up from a range in some counties of seventeen percent to ninety-six percent in others. Six or seven years ago, judges in metropolitan counties spent about thirty percent of their time on criminal cases. In 1989, they spent as much as sixty percent of their time on criminal cases. Virtually all courts report an increase in drug trafficking and abuse cases; in the larger counties, the increase is thirty-two to forty percent.

The most alarming statistics are in the juvenile justice system. The National Council of Family and Juvenile Court Judges estimates that sixty to ninety percent of juvenile or domestic relations cases arise from an underlying substance abuse problem. We appreciate the advice and assistance we have received from Youth Services Director Natalucci-Persichetti. In Ohio, in the last two years, there has been a 635 percent increase in drug-related juvenile cases. Twenty percent of the juveniles in our juvenile justice system are engaged in drug trafficking; this figure will likely increase to thirty-three percent in the next two years. Eighty-seven percent of the residents in the Department of Youth Services' facilities are addicted to at least one substance.

The Governor's Committee on Prison and Jail Crowding reports that the state prisons are at 150 percent of capacity. From 1987 to 1989, the drug offender population in state institutions increased by 110 percent. One-fourth of all new inmates are drug offenders.

If you visit a courtroom in many of our counties, you will see repeat offenders convicted of a new crime having never seen the inside of a jail for their previous offenses; you will see judges frustrated because they know if they sentence a first-time offender on a drug possession charge, there is simply no place to incarcerate him; you will be told by the judge that because the local jail is overcrowded, split sentencing is no longer an option, and that he never sentences a first-time, nonviolent offender to prison because he knows that a violent offender may be released if he imposes the sentence the statute allows.

All three branches have responded to the inability of our society to control the drug culture. Correction and rehabilitation facilities are being constructed by the executive branch; you are considering comprehensive legislation sponsored by Senator Henry and Representative Shivers; Senator Meshel has demonstrated a deep interest in the problem. Together, Governor Celeste, Lieutenant-Governor Leonard, Speaker Riffe and President Aronoff, Attorney General Celebrezze, and I demonstrated the determination of all three branches of our government to coordinate our efforts by convening a drug summit last December. And a Supreme Court Committee chaired by Justice Wright has pro-

duced a comprehensive report with a number of recommendations that will help the judiciary meet the crisis.

Before placing priorities on the legislative recommendations in the Report, I will review the actions we have taken to date. In fact, at least one other state, Arizona, has already begun to implement some of the recommendations in our report.

1) We have submitted to both houses of the General Assembly proposed amendments to the Rules of Evidence and Rules of Criminal Procedure that would permit courts to use magistrates to conduct arraignments, pretrial conferences, and bond hearings. In some courts, such a practice will relieve the judges of entire days of conducting routine proceedings.

2) In response to the Committee's recommendation, the Ohio Judicial College has postponed planned courses in order to schedule seminars on case management techniques that are designed to assist courts in meeting increased caseloads.

3) We will be providing specialized substance abuse training for juvenile court judges and personnel.

4) We will revise our case reporting forms to provide more detailed statistical reporting of drug cases.

5) We are considering rule changes that would permit the establishment of separate criminal and civil dockets in some of our busier courts. In many courts, it is the civil docket, it is people who have nothing to do with the drug culture, that bear the greatest impact of drug cases. Because of our speedy trial laws, the criminal cases, of course, are heard first. They do not fall between the cracks. It is civil litigants who are repeatedly told that their case must wait, their trial date must again be continued, because the judge to whom the case is assigned must hear a criminal case. In Cuyahoga County, a civil case that came to trial in 292 days in 1983 will not come to trial for 420 days in 1989.

The Committee did not view the creation of additional judgeships as the solution. Rather, I will be assembling a team of retired and sitting judges who will be assigned to assist in areas where the pressure on court dockets is the greatest.

Each of you has received a copy of the Committee Report, which calls for more probation officers, a sentence review commission, money for more drug-testing labs, increased authority for juvenile judges over parental misconduct, and the delaying or suspension of drivers' licenses of youthful offenders. These recommendations deserve your careful consideration. But I recognize that funds are limited and we are not able to do all we wish we could do.

When I met three weeks ago with Senator Henry and Representative Shivers, they asked me to place priorities on the Committee's recommendations. I will share with you the discussion that ensued. I believe, based upon my discussions with Director Natalucci-Persichetti, juvenile judges, and others who are seeing the impact of the drug crisis first hand, that two aspects of the problem must have the highest attention of all three branches of government.

The first priority is the juvenile justice system. Although I personally believe that education and experience will ultimately be the long-term answer, we

must deal swiftly, decisively, and creatively with every juvenile offender, from the first-time user to the high-living trafficker.

I urge you to listen carefully to the request of juvenile judges for broadened jurisdiction over the adults in the lives of juvenile drug abusers and traffickers. I urge you to explore all of the alternatives available in the rehabilitation of all juvenile abusers, regardless of their ability to pay. Statistics and common sense tell us that a first- or second-time juvenile abuser of drugs will graduate from the juvenile justice system to the adult justice system if he or she is merely warehoused with serious offenders. Your program, enacted in Amended House Bill 812 last session, to authorize and fund the construction and renovation of locally operated detention facilities for nonviolent juveniles recognizes this fact and allows existing state facilities to be used for the housing of dangerous juvenile offenders. At a recent national meeting of chief justices, drug abuse experts reported that people in court-ordered drug treatment programs commit seventy-five percent fewer crimes than they did prior to treatment. We simply must make every effort possible with the resources we have to catch the youthful offenders in their fall to the depths of addiction.

The second priority is a review of the penalty-incarceration link in the criminal justice chain. The funding, construction, and operation of correction and rehabilitation facilities is the joint responsibility of the executive and legislative branches. But it must be obvious to us all that a sentence that cannot be served because there is no room in the jail or prison, or a sentence that is shortened to make room for a new inmate, does very little, if anything, to deter crime. In some counties, convicted criminals literally laugh at the law because they know they will not be incarcerated. Ladies and gentlemen, there should be no safe harbors for drug abusers and traffickers in Ohio. We in the judiciary stand ready to assist you in appropriate ways as you move drug abuse legislation to adoption in both houses.

I know that you share our determination that the drug dealers and users who have taken control of some of our streets must not be permitted to control the dockets and authority of our courts.

Late in the eighteenth century, James Madison saw a "chain of connection" binding the three branches of government. Late in the twentieth century, that chain of connection will enable us to meet the greatest challenges of our day.

III. CONCLUSION

Mr. President, Mr. Speaker, members of the 118th General Assembly, on behalf of the judiciary, I am grateful for the privilege you have given the judicial branch to deliver this report. I pray that we will have the wisdom to continue to cherish and protect our independence as we are forced by the events of our time to search together for the solutions we must find. May God bless our work.

